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Foreword

Antitrust's Troubled Relations with Intellectual Property

Daniel J. Gifford[†]

I. UNCERTAINTY OVER THE RELATIONS BETWEEN INTELLECTUAL PROPERTY AND ANTITRUST

Throughout most of the history of the antitrust laws, the relationship between antitrust laws and patent, copyright, and other intellectual property laws has been a subject of controversy. The courts have sometimes allowed intellectual property law to trump antitrust law, and at other times they have done the opposite. One would think that, given the over one-hundred-year period the Sherman Act has been on the books, the relationships between these two sets of laws would be settled by now. Yet, as recent litigation in the Federal, Ninth, and District of Columbia Circuits demonstrates, the antitrust/intellectual property interface remains as troubled and unsettled as ever.¹

One might also think that the present uncertainties about the proper relations between antitrust and intellectual property laws could be resolved by examining the purposes of these two sets of laws. Yet the fact that the courts have never been able to determine the proper relationships between these laws is enough to give a scholar pause before undertaking such

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1. See *United States v. Microsoft Corp.*, 253 F.3d 34, 62-64 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001); *In re Indep. Serv. Org. Antitrust Litig.*, 203 F.3d 1322, 1327-29 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1218 (9th Cir. 1997) (noting that the lack of boundaries placed on lawsuits based on unilateral conduct will result in a reduced incentive to risk the costs associated with innovation, and that effect is contrary to the purposes of intellectual property and antitrust laws, which are designed to encourage innovation).

an examination. Perhaps the difficulties that the legal system has experienced in relating these two sets of laws to one another lie in our inability to discern the purposes behind one or both sets of laws.

II. THE PURPOSES OF INTELLECTUAL PROPERTY AND ANTITRUST: WHAT DO WE KNOW?

A. THE PURPOSES OF INTELLECTUAL PROPERTY LAW

We all know, or think we know, something about the purposes of the laws governing intellectual property. Intellectual property laws exist to remedy what would otherwise be a market failure. Intellectual property laws bring invention and artistic creativity into the property rights regime, and confer economic incentives upon inventors and artists that are analogous to those operating in the general commercial marketplace.²

That is not to say that intellectual property justifications are necessarily all economic ones. We know that there is a prominent strain of Continental European thought, beginning with Kant and Hegel, that locates a justification for the social institution of private property in its connection with personality.³ We know that this strain of thought has influenced the Continental approach to intellectual property. Yet, in the Anglo-American tradition, it is the economic approach that has been predominant. The philosophical father of this tradition is probably John Locke, who believed that what one creates should belong to the creator.⁴ Later, Adam Smith provided us with an elaborate theory of how the property system generates wealth.⁵ The intuition underlying Smith's

2. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1988); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1983); *Diamond v. Chakrabarty*, 447 U.S. 303, 307 (1980); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

3. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 290 (1970) (discussing Kant); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330-44 (1988) (discussing Hegel); see also Miranda Oshige McGowan, *Property's Portrait of a Lady*, 85 MINN. L. REV. 1037, 1046-50 (2001) (describing Hegel's approach to private property).

4. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 305-06 (Cambridge University Press, 1960) (1698).

5. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

theory, however, was widely appreciated long before he committed it to paper. Indeed, the ability of private property to generate economic incentives was both appreciated in and incorporated into the intellectual property laws of seventeenth and eighteenth century England. The seventeenth century English legislation on patents⁶ and the eighteenth century English legislation on copyrights⁷ were both premised upon the understanding that intellectual property rights would generate incentives to creativity.⁸ The Patent and Copyright Clause of the U.S. Constitution⁹—a provision written only eleven years after the publication of Adam Smith's *Wealth of Nations*—explicitly recognizes the incentive effects of intellectual property and ensures that the rationale of American patent and copyright law will remain an instrumental one: that the protection these laws afford will be justified by their incentive effects.¹⁰

B. THE PURPOSES OF THE ANTITRUST LAWS

Do we know as much about the purposes of our antitrust laws as we do about our intellectual property laws? Perhaps, and then again, perhaps not. An array of scholars has attempted to divine Congress's objectives in enacting the Sherman Act. Robert Bork, examining the debates, concludes that the Sherman Act was designed to promote efficiency.¹¹

6. An Act Concerning Monopolies and Dispensations with Penal Laws and Forfeitures Thereof (Statute of Monopolies), 1623, 21 Jac. I, c. 3 (Eng.).

7. An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Author's or Purchasers of Such Copies, During the Times Therein Mentioned (Statute of Anne), 1710, 8 Ann., c. 19 (Eng.).

8. See Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 912-16 (2002).

9. U.S. Const. art. I, § 8, cl. 8; see Ochoa & Rose, *supra* note 8, at 922-28.

10. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1988) ("The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general good." (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932))).

11. ROBERT H. BORK, *THE ANTITRUST PARADOX* 66 (1978); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) (noting that "the policy the courts were intending to apply is the

Many observers are suspicious of that conclusion, however, because efficiency may not have been a widely recognized social objective in 1890.¹² Rudolf Peritz, reading the same material, concludes that Congress drafted the Sherman Act to protect small businessmen.¹³ Robert Lande believes that Congress was motivated by a desire to protect consumers from monopoly pricing.¹⁴

It is not surprising that there is a wide diversity of views among these scholars. The Act itself is phrased in broad and delphic terms. Additionally, an array of sentiments was expressed in the congressional debates. Many legislators feared the emergence of very large business firms in the American economy. Many feared for the welfare of the small business owners who were increasingly threatened by the efficiencies or the aggressive tactics of their larger rivals.

Early judicial decisions reflected the widespread uncertainties about the purposes behind the Sherman Act and the other antitrust laws. Initially, the Supreme Court construed the Sherman Act to condemn even restraints that were considered reasonable at common law.¹⁵ The Court later reversed course, however, adopting the so-called rule of reason in 1911.¹⁶

maximization of wealth or consumer want satisfaction").

12. Barbara Fried's assertion that marginal analysis was widely accepted in the economics profession by 1890 is not necessarily inconsistent with Robert Lande's belief that members of Congress were unfamiliar with the concept of allocative efficiency. Compare BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* 127 (1998), with Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 88 (1982).

13. RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992*, at 15 (1996).

14. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 899-901 (1999); Lande, *supra* note 12, at 70.

15. See *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 575 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327-28 (1897) (stating that the Sherman Act condemns "every contract or combination in restraint of trade" and its prohibition "is not limited to that kind of contract alone which is in unreasonable restraint of trade").

16. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 179-80 (1911). After adopting the rule of reason, the Court wrestled with the meaning of unreasonableness. Justice Brandeis, in a classic description of the rule of reason, asserted that the rule required an elaborate inquiry. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). It was decades before Brandeis's wide-ranging rule-of-reason inquiry was widely understood to be largely satisfied by a showing

Judge Learned Hand, in his 1945 *Alcoa* opinion,¹⁷ embraced the view that the Sherman Act and other antitrust acts were designed to foster small and locally owned businesses.¹⁸ He thus incorporated some significant distributional concerns into the Act. Judge Hand thought that an economy composed of small business firms was preferable to an economy of large firms, even if the former operated at a higher level of cost. Inconsistently, however, he ruled that a firm would be justified in achieving monopoly status, so long as the monopoly was "thrust upon" it as a result of the firm's efficiencies.¹⁹

Judge Hand's thoughts on industrial organization were essentially repeated in the Supreme Court's *Brown Shoe* opinion in 1962.²⁰ This was the Court's first opportunity to construe the 1950 amendment to the Clayton Act's merger provisions. The Court ruled that the cost savings generated by eliminating a step in the distribution chain, while beneficial to society, should nonetheless be condemned because the merged company's enhanced efficiency would put unintegrated small retailers at a competitive disadvantage.²¹ During the 1960s, the Court condemned every merger brought before it. Yet, it failed to identify a consistent underlying theory on which to base its decisions.²²

Indeed, it was only in the mid-1970s that the Court began to follow the microeconomic approach to antitrust law commonly referred to as the Chicago-school approach. Many observers believe that the Court switched gears in 1974 with its decisions in *General Dynamics* and two bank-merger cases.²³

that output in the general market was restricted to a level less than it would be in a competitively structured market. See *FTC v. Ind. Fed. of Dentists*, 476 U.S. 447, 460-61 (1986); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 104 (1984).

17. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

18. *Id.* at 428-29 (supporting the belief that "great industrial consolidations are inherently undesirable, regardless of their economic results").

19. *Id.* at 429-30.

20. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

21. *Id.* at 344.

22. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that in litigation under § 7, the Government always wins.").

23. See *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States v. Conn. Nat'l Bank*, 418 U.S. 656 (1974).

At least by its 1977 decision in *GTE Sylvania*,²⁴ the Court had apparently come to embrace an efficiency approach to antitrust law.²⁵ Yet, the Court's adherence to efficiency has not been consistent. Although it has repeatedly insisted that per se rules should condemn only behavior that is always or almost always anticompetitive,²⁶ the Court has not always followed its own admonitions. We continue to have per se rules that are overbroad or cannot be justified by efficiency concerns.²⁷ Cases such as *Aspen Skiing*²⁸ and *Eastman Kodak*²⁹ do not easily fit an efficiency model, and may be better explained on populist grounds or on the basis of a special concern for fair dealing with competitors. Despite these occasional deviations from the efficiency paradigm, however, that paradigm has brought a new predictability to the antitrust laws that they previously lacked.

Even though the Court is commonly described as following a Chicago-school approach to the antitrust laws, there remains ambiguity in identifying the laws' purposes. Neither the courts nor the antitrust enforcement authorities has spoken precisely on the underlying purposes of the antitrust laws.³⁰ The Court has several times announced that the purpose of the antitrust laws is to advance consumer welfare.³¹ What that means,

24. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

25. *See id.* at 58 (overturning precedent imposing a per se prohibition on vertical restrictions because there had been no showing that the restrictions always hinder competition).

26. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100 (1984); *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979).

27. The per se rule condemning vertical price-fixing agreements appears to be overbroad to the extent that the rule applies in circumstances where there are no cartels or oligopolies whose anticompetitive pricing could be reinforced through vertical price-fixing agreements. *Bus. Elecs. Corp.*, 485 U.S. at 725-27. The per se rule condemning tying arrangements appears to be unwarranted for reasons set forth in Justice O'Connor's opinion in *Jefferson Parish. Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 33 (1984) (O'Connor, J., concurring).

28. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

29. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).

30. *See Daniel J. Gifford & Robert T. Kudrle, Alternative National Merger Standards and the Prospect for International Cooperation*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW* 208, 218-23 (Daniel L.M. Kennedy & James D. Southwick eds., 2002).

31. *See Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 107; *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 367 (1982) (Powell, J., dissenting); *Reiter v.*

however, is unclear. Indeed, when Justice Burger stated in *Sonotone* that the antitrust laws were a "consumer welfare prescription," he referenced Bork's *Antitrust Paradox* as authority.³² Bork used the phrase "consumer welfare" in *Antitrust Paradox* as equivalent to a combination of consumer surplus and producer surplus.³³ Bork's analysis followed Oliver Williamson who had previously argued that a transaction should be deemed consistent with the antitrust laws if it generated efficiencies that exceeded the deadweight social loss generated by a monopolistic restriction of output.³⁴ Although Williamson employed the conventional language of welfare economists to make his point, Bork's repetition of the Williamson analysis employed the "consumer welfare" phrase to refer to the combination of producer and consumer surplus.³⁵ Did Burger mean that the antitrust laws seek the total welfare of society as Bork would argue? Or, did Burger mean that the antitrust laws seek to maximize the welfare of consumers as a class and, thus, to preference consumer welfare over producer welfare?

A number of the lower courts appears to believe that the antitrust laws contain a distributional element: that a transaction must produce some benefit to consumers as a class in order to pass muster under antitrust analysis.³⁶ That position, of course, has long been argued by Robert Lande.³⁷ The Justice Department's merger guidelines³⁸ are ambiguous on this issue, however. Do they incorporate a consumer welfare approach in the narrow sense with Lande or in a broad sense with Bork? There is some ground for believing that the merger guidelines were moving towards a total surplus approach

Sonotone Corp., 442 U.S. 330, 343 (1979).

32. *Reiter*, 442 U.S. at 343.

33. BORK, *supra* note 11, at 107-10.

34. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 33-34 (1968); see also Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 706-09 (1977).

35. BORK, *supra* note 11, at 107-10.

36. Some of the merger decisions have discussed how much of the merger-generated cost savings would likely be passed on to consumers, thus suggesting a consumer surplus rather than a total surplus norm. See *FTC v. Cardinal Health, Inc.*, 12 F. Supp 2d. 34, 62 (D.D.C. 1998); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991).

37. See *supra* note 14 and accompanying text.

38. Merger Guidelines—1992 (With April 8, 1997, Revisions to Sec. 4 on Efficiencies), 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Dep't Justice & FTC).

during the Reagan and the first Bush administrations. The amendment to the efficiency provisions of the guidelines during the Clinton administration, however, suggests a shift towards a consumer surplus approach. Yet, at no time have the enforcement agencies been forthright about their position on this issue.³⁹

Perhaps the historically troublesome relations between intellectual property and antitrust laws can be explained by the Court's periodic revisions of its approach to the purposes of antitrust law. Sometimes the Court has construed antitrust law from a populist perspective. Sometimes it has treated it as a mandate to protect small business. More recently, the Court has construed the antitrust laws as embracing an efficiency norm. Yet even today, we must leave open the question of whether the efficiency norm underlying antitrust laws is one that seeks to maximize consumer surplus or one that seeks to maximize total surplus. My colleague David McGowan believes (as I do) that the reconciliation of antitrust and intellectual property laws would be aided if the courts would construe the antitrust laws as intended to maximize total surplus.⁴⁰

III. ANTITRUST AND INTELLECTUAL PROPERTY: FOCUS OF CONFLICT

Where do the antitrust laws and the intellectual property laws come into contact? Historically, they have come into contact most frequently where sellers or lessors have sought to tie one product or service to another. Recall back in 1914 when Congress in section 3 of the Clayton Act conditionally forbade the tying of one commodity to another, it included in its prohibition the modifying phrase "whether patented or unpatented."⁴¹ Congress placed that language in the Clayton Act's anti-tying provision because it wanted that provision to apply to the leases of the United Shoe Machinery Corporation—leases that had been defended by Louis Brandeis

39. See Robert M. Vernail, *One Step Forward, One Step Back: How the Pass-On Requirement for Efficiencies Benefits in FTC v. Staples Undermines the Revisions to the Horizontal Merger Guidelines Efficiencies Section*, 7 GEO. MASON L. REV. 133, 133-34 (1998); Gregory J. Werden, *An Economic Perspective on the Analysis of Merger Efficiencies*, 11 ANTITRUST 12, 13-14 (Summer 1997).

40. David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 730, 740, 784-85 (2001).

41. 15 U.S.C. § 14 (2000).

acting as counsel to that company—which required lessees to obtain all their additional requirements of shoe machinery from that company.⁴²

The phrasing of section 3 of the Clayton Act marked merely the beginning of a long and complex relationship between antitrust laws and patent, copyright, and other intellectual property laws. Congress inserted the quoted language in section 3 to prevent the courts from excusing otherwise unlawful tying because the tying product itself was patented. Congress, in other words, wanted the antitrust laws to apply in the same fashion, regardless of the patented nature of the product involved. The existence of a patent was not to count for or against antitrust liability. In other contexts, the courts would later use the patented nature of a product as a means of condemning behavior that otherwise might be lawful. On other occasions, the courts have used the patented nature of a product to excuse behavior that, in the absence of the patent, would be unlawful—an approach that Congress sought to forestall in its phrasing of section 3 of the Clayton Act. Indeed, the courts have exhibited a schizophrenic attitude towards intellectual property, sometimes allowing intellectual property rights to trump antitrust laws and sometimes doing exactly the opposite.

We might begin our inquiry into the reasons for this inconsistency with a look at a simple tying arrangement. Take the now-famous case in which the Justice Department successfully challenged the practice of the International Business Machines Company (IBM) that required lessees of its early computers to purchase the punched cards needed to run the machines from IBM.⁴³ Later critics of that decision pointed out that IBM may have used sales of the punched cards as a price discrimination mechanism. IBM could, through sales of punched cards whose prices were marked up substantially over their costs, charge higher prices to customers who used computers intensively (and therefore probably placed a high value on them) and lower prices to customers who used them

42. ALPHEUS THOMAS MASON, *BRANDEIS A FREE MAN'S LIFE* 215-19 (Viking Press 1946).

43. *Int'l Bus. Mach. Corp. v. United States*, 298 U.S. 131, 140 (1936) (finding no justification for imputing an exception to the Clayton Act that would allow IBM to protect its good will through monopolistic means where alternative companies were capable of producing equally effective punch cards).

less intensively (and therefore probably valued them less).⁴⁴ Indeed, it would be in IBM's interest (if it could) to use the tie to charge each customer its reservation price. If it did, IBM would be acting as a perfectly discriminating monopolist, both maximizing its profits and expanding its production as it sold to each customer at its reservation price.

Those who, like Lande, view the antitrust laws as protecting consumers from monopoly pricing would be offended by IBM's attempt to replicate the behavior of a perfectly discriminating monopolist. They would view price discrimination as anticompetitive and hence unlawful. Others who, like Williamson and Bork, view the antitrust laws as designed to foster efficiency would see IBM's price-discrimination as reducing or eliminating the social waste that ordinarily is generated by a single-price monopolist (i.e., a monopolist that does not engage in price discrimination). They would tend to view a monopolist's practice of price discrimination as a social benefit (and hence as lawful), if it encouraged the monopolist to expand its output beyond the level that would be optimum for a single-price monopolist. These differences in approach were more recently reflected in the several opinions accompanying the Supreme Court's decision in *Jefferson Parish v. Hyde*.⁴⁵ The plurality opinion identifies price discrimination as one of the evils of tying.⁴⁶ Justice O'Connor's concurring opinion observes that tying sometimes promotes efficiency.⁴⁷

It may be, however, that when we speak of the antitrust/intellectual property interface we both correctly identify the problem we wish to consider and obscure it. The interaction of antitrust laws with intellectual property laws may not be problematic. Rather, it may be the dimensions of intellectual property itself—as measured and defined by intellectual property laws themselves—that are the source of the trouble. I attempt to show this below. If I am correct that the source of the problem lies in the judicial constructions of the dimensions of intellectual property law, then the problem lies in large part, not in uncertainty over the purposes of the antitrust laws, but in uncertainty over the precise objectives of

44. See, e.g., ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 384-87 (1985).

45. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984).

46. *Id.* at 15.

47. *Id.* at 40 (O'Connor, J., concurring).

the intellectual property laws themselves.

IV. THE OBJECTIVES OF INTELLECTUAL PROPERTY LAW RECONSIDERED

Following the Supreme Court's decision in *Motion Picture Patents*,⁴⁸ the courts have imported competition policy into intellectual property laws. Yet, this competition policy has not necessarily been the same competition policy reflected in antitrust laws. In *Motion Picture Patents*, the Court refused to enforce a condition imposed by a patentee upon the use of its invention.⁴⁹ The patentee had sought, by a licensing condition attached to its patented device for feeding motion-picture film to projectors, to limit its use to films authorized by the patentee.⁵⁰ In refusing to give effect to the condition imposed by the patentee, the Court referenced the social policy it believed to have been incorporated in the Clayton Act's anti-tying provisions.⁵¹ The Court did not apply the Clayton Act to the transaction before it, but rather incorporated its understanding of the competition policy contained in the Clayton Act into the parameters of patent law.⁵² The Court said that nothing in patent law gives a patentee the right to condition the use of a patented invention with goods selected by the patentee.⁵³ Therefore, the validity of the condition must be judged by the general law. Nothing in the general law authorizes such conditions upon use. Indeed, the common law had traditionally invalidated such restrictions as restraints upon alienation. The conditions were, therefore, unenforceable.

Later, under the rubric of a new doctrine of patent misuse, the Court refused to enforce patents that were employed to sell a second product in a tying arrangement.⁵⁴ The Court's apparent basis for the decision was its desire to import competition policy into patent law. This incorporation of

48. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917), *overruling* *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912).

49. *Id.* at 506-07.

50. *Id.* at 503.

51. *Id.* at 517-18.

52. *Id.* at 517-18.

53. *Id.* at 518.

54. *See* *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 666-67 (1944); *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680, 684 (1944); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 493 (1942); *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 33-34 (1931).

competition policy into patent law culminated in 1944 in the *Mercoïd* cases⁵⁵ where the Court pushed the logic of its condemnation of patent-related tying to an extreme length. The subject of the *Mercoïd* cases were patents for heating systems. The patentee sold, and licensed others to sell, controls for the heating systems, but it did not sell the heating system itself. Rather, customers who purchased the controls were licensed to use the controls to install the heating system.⁵⁶ As the Court saw the arrangement, the patentee used the patent as a tying product. In order to obtain a license to install the heating system (the patented tying product), a person was required to purchase the furnace controls (the tied product).⁵⁷ The Court did not inquire into whether the controls possessed any use other than in conjunction with the patented heating system. The Court found misuse⁵⁸ and an antitrust violation.⁵⁹ In the process, the Court undermined the doctrine of contributory infringement.⁶⁰

With the wisdom of hindsight, we might say that the Court's *Mercoïd* decisions were mistakes. If the controls were usable only in the patented heating system, then there is a one-for-one relationship between a sale of the controls and the issuance of a license for the heating system. Both because the controls were usable only in the heating system and because of the fixed one-for-one relationship between the heating system and the controls, the patentee's method of marketing its product (the license plus the controls) could not have added to the patentee's power. There was, in fact, no adverse effect on competition in the marketplace.

Scholars probing into the economic consequences of tying arrangements would later show that ties involving fixed

55. *Mercoïd Corp. v. Mid-Continent Inv. Co.*, 320 U.S. at 661; *Mercoïd Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. at 680.

56. *Mercoïd Corp. v. Mid-Continent Inv. Co.*, 320 U.S. at 663.

57. *Id.* at 666-67.

58. *Id.* at 668.

59. *Mercoïd Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. at 684.

60. *Mercoïd Corp.*, 320 U.S. at 669. Contributory infringement involves the furnishing of an essential component of a patented product to a direct infringer who uses that component to construct the patented product. Section 271 of the patent act provides that the sale of a staple article or commodity of commerce suitable for substantial noninfringing use does not constitute contributory infringement. 35 U.S.C. § 271(c) (2000).

proportions cannot expand the power of the seller.⁶¹ Nor would those ties have any adverse consequences on competition at all. Years before these scholarly critiques emerged, however, Congress took it upon itself to correct what it perceived as errors in the *Mercoïd* decisions. In the Patent Act of 1952, Congress declared that it was not misuse for a patentee to tie a patent license to the sale of a product whose only use was with the patent.⁶² In 1988, Congress further defined misuse. The 1988 amendments explicitly permit patentees to refuse licenses.⁶³ These amendments also permit a patentee lacking market power to tie staple commodities to a patented product or license, thus incorporating the prevailing antitrust standard into the parameters of the misuse doctrine.⁶⁴ These congressional efforts to merge the standards for patent misuse with antitrust standards were aided, during the last two decades, by decisions in the Federal Circuit that require a showing of anticompetitive effect before applying the patent misuse doctrine.⁶⁵

In the 1990s, the lower courts developed anew a doctrine of copyright misuse, one that is expressly modeled upon the judicially developed patent misuse doctrine.⁶⁶ The courts that applied this doctrine appeared to take as their model the patent misuse doctrine as it existed prior to its congressional modification. Under this new copyright doctrine, it is misuse to use a copyright to effect a tie, or indeed to enter into a contract,

61. See BORK, *supra* note 11, at 375-81; RICHARD A. POSNER, ANTITRUST LAW 172-74 (1976); Ward S. Bowman Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 36 (1957); M. L. Burstein, *A Theory of Full-Line Forcing*, 55 NW. U. L. REV. 62, 93-95 (1960); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 292 (1956).

62. Patent Act of 1952, ch. 28, 66 Stat. 811, § 271.

63. Pub. L. No. 100-703, Title II, § 201, 102 Stat. 4676 (1988) (codified as amended at 35 U.S.C. § 271 (2000)).

64. 35 U.S.C. § 271(d)(5) (2000).

65. See *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 868-69 (Fed. Cir. 1997); *B. Braun Med. Inc. v. Abbott Labs.*, 124 F.3d 1419, 1426-27 (Fed. Cir. 1997); *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 708 (Fed. Cir. 1992); *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001-02 (Fed. Cir. 1986). For a discussion of these cases, see Robert J. Hoerner, *The Decline (and Fall?) of the Patent Misuse Doctrine in the Federal Circuit*, 69 ANTITRUST L.J. 669, 675-84 (2002).

66. See *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792-95 (5th Cir. 1999); *Practice Mgmt. Info. Co. v. Am. Med. Ass'n*, 121 F.3d 516, 520-21 (9th Cir. 1997); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 976-77 (4th Cir. 1990).

for the exclusive supply of a copyrighted product.⁶⁷ There is some suggestion in the case law that a refusal to license could constitute misuse.⁶⁸ The decisions make clear the divergence between the copyright misuse doctrine and the standards of antitrust law. There is, for example, no rule-of-reason analysis applied in a determination of misuse.⁶⁹

The judicial attempt to incorporate competition policy into the intellectual property laws, thus, continues apace. During the period from 1917 to 1944, we saw the judiciary progressively inserting competition policies—in the form of anti-tying policies—into the patent law. In the 1990s, the judiciary has been inserting competition policies into the copyright law. Questions remain as to what objectives the courts seek as they incorporate competition policies into the intellectual property laws. Are they seeking the same objectives as the antitrust laws? As competition policies are incorporated into the intellectual property laws, the parameters of these laws are being redrawn. It is appropriate, therefore, to inquire into the underlying rationale of the intellectual property law modifications that are being introduced.

V. THE PURPOSES OF THE INTELLECTUAL PROPERTY LAWS: THE JUDICIAL VIEW

A pure incentive model of the intellectual property laws⁷⁰ does not explain the inclusion of the strands of competition policy that the courts have introduced via the misuse doctrine. Is it possible to describe more precisely the purposes and parameters of the intellectual property laws in a way that includes not only their economic-incentive rationales, but also the elements of competition policy that those laws have absorbed?

A. PATENT LAW

When the courts (through the mechanism of the misuse doctrine) introduced elements of competition policy into patent law between 1917 and 1944, they may have intended to make

67. *Practice Mgmt. Info. Co.*, 121 F.3d at 521.

68. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 n.8 (9th Cir. 2001).

69. *Lasercomb Am.*, 911 F.2d at 977-78.

70. See *supra* note 2 and accompanying text.

patent law consistent with antitrust law. The Court read the Clayton Act as enunciating an anti-tying social policy; the Court then incorporated that policy in its *Motion Picture Patents* decision. That basic orientation appears to explain its later decisions through the *Mercoïd* cases. This approach was not unreasonable at a time when the courts believed that tying arrangements in general were devoid of all social virtue.

The larger question remains to be answered: How did the courts of this time understand the purposes and parameters of the patent law, as judicially modified through the misuse doctrine? A plausible answer is that they saw tying as a means for leveraging power from the tying product to the tied product, whereby the misuse doctrine was designed to prevent that leveraging. Courts of this period were sometimes confused about the actual power of patents. Sometimes they acted as if patents in themselves conferred economic power. Indeed, we have already noted that the courts of the 1950s and 1960s sometimes presumed the existence of economic power from the very existence of a patent.⁷¹ The purposes and parameters of patent law were then understood by the courts in this way: Patent law creates a system of economic incentives designed to foster invention, but the incentive structure of patent law is not to be augmented by leveraging the power of the patent.

The congressional restrictions upon the misuse doctrine imposed in 1952 and elaborated in 1988 redefine the kind of competition policy that can be appropriately introduced into patent law. In 1952, Congress insisted that there was no improper leverage when a patentee tied a nonstaple product—viz., one specially made for use with the patented product and which has no other use—to the patent or patent license. As observed above, this congressional position was later vindicated by scholars studying the economic effects of tying arrangements. In 1988, Congress elaborated the statutory provisions governing patent misuse to ensure that misuse could not be extended beyond the prohibitions on tying then embodied in the antitrust laws.

B. COPYRIGHT LAW

Just as patent law was redesigned in the first half of the twentieth century by the judicial introduction of elements of competition policy, so too copyright law is being redesigned by

71. See *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962).

those courts that have introduced elements of competition policy into that law via the copyright misuse doctrine. As redesigned, copyright law now provides an economic incentive to artists and authors to create literary and artistic works, but that incentive effect is denied whenever the copyrighted work is the subject of a tie or an exclusive supply arrangement, or perhaps whenever the copyright holder refuses to grant a license.

There is no apparent rationale for these newly introduced restrictions. The courts apparently believe that, by introducing restrictions, they are furthering a pro-competitive social policy. Yet, such a belief would not withstand analysis.⁷² Most copyrighted works are in competition with other works. Painters, even great painters, compete for the attention of critics, galleries, and collectors.⁷³ The works of hundreds of writers fill our bookstores. Composers of serious music similarly vie for the attention of critics, and popular composers compete intensely among themselves.

Congress intervened in patent law to ensure that the competition policies that the courts had incorporated into that body of law reflected the competition policy embodied in the antitrust laws. Whether Congress will similarly intervene in copyright law is unclear. What is certain, however, is that the competition policies impact copyright law, not from the outside, but from within. The competition policies that affect the application of copyright law were created by the courts as a part of copyright law itself. These policies are contained in the copyright misuse doctrine.

VI. INTELLECTUAL PROPERTY AS JUST PROPERTY

Would the confusion in the case law be diminished if the courts were (and were able) to treat intellectual property in the same way that they treat any property? That was the intent of Congress in section 3 of the Clayton Act. The law was to be applied to the tying of commodities in the same way "whether [they were] patented or unpatented." That direction mirrored congressional modifications of the patent misuse doctrine, as

72. See Daniel J. Gifford, *The Antitrust/Intellectual Property Interface: An Emerging Solution to an Intractable Problem*, HOFSTRA L. REV. (forthcoming 2003) (discussing the emergence and development of copyright misuse).

73. See Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT. L.J. 569, 590-99 (2000).

noted above. In prohibiting a finding of misuse when a patent was combined or tied to an article having no other use than in conjunction with the patent, Congress was legitimating behavior that would not create anticompetitive effects. Moreover, by requiring that the tie of a staple to a patented product be deemed misuse only when the patent possessed market power, Congress was bringing the misuse doctrine into conformity with prevailing antitrust standards.

How would such an approach affect the results in some of the most widely discussed recent cases? Observers have been troubled by the different results in the Federal Circuit's *Xerox* decision and the Ninth Circuit's *Kodak* decision. In the former case, the Federal Circuit allowed rights under the patent and copyright law to trump antitrust concerns,⁷⁴ while in the latter case, the Ninth Circuit allowed antitrust law to trump intellectual property claims.⁷⁵ Unfortunately, the focus (by both the courts and by observers) upon the intellectual property issues probably diverted attention from the alleged restraint that, in both cases, involved the alleged exercise of power by an equipment manufacturer over spare parts and manuals necessary to provide maintenance and repair services.

The underlying issue—whether an equipment seller acts anticompetitively when it refuses to supply replacement parts to independent servicing firms offering maintenance and repair services in competition with the seller of the equipment—has come before the courts repeatedly during the last decade. The Supreme Court considered this issue in its *Eastman Kodak* decision of 1992, and an array of lower courts have dealt with that issue since that time.⁷⁶ Following the Supreme Court's lead, the courts have concluded that if the servicing market is not constrained by competition in the equipment market, then the refusal to supply parts to the independent servicing firms reduces competition in the servicing market. If the service market is so constrained, however, then no reduction in

74. *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327-29 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).

75. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1218-20 (9th Cir. 1997).

76. *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11 (1st Cir. 1999); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997); *PSI Repair Servs., Inc. v. Honeywell Inc.*, 104 F.3d 811 (6th Cir. 1997); *Allen-Myland, Inc. v. Int'l Bus. Machs. Corp.*, 33 F.3d 194 (3d Cir. 1994); *Virtual Maint., Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993).

competition results.⁷⁷ Taking this approach to the problem, the Sixth Circuit ruled, in one of the leading servicing aftermarket cases, that because Honeywell had consistently and openly followed a policy of denying parts to all independent servicing organizations, its policy was taken into account by the equipment market. Competition in the equipment market constrained its behavior in the aftermarket, and hence its behavior was lawful.⁷⁸

Arguably, the *Xerox* case could have been decided on those grounds. If the servicing market was constrained by the equipment market, then Xerox acted lawfully in denying parts to the independents. If Xerox could show that it had openly and consistently followed its policy of denying parts to independents, as Honeywell had done, then the servicing market would have been constrained by competition in the equipment market. Xerox would have prevailed and no clash between intellectual property and antitrust would have occurred. If the servicing market was not constrained by competition in the equipment market (say, because Xerox changed its policy from providing parts to independent servicing organizations to one of not providing them), then under the prevailing law Xerox would ordinarily be deemed to have monopolized. Is it good public policy for the intellectual property laws to change this result? Critics of the *Xerox* decision might ask whether the intellectual property laws confer a right to trap unwary customers into entering a dependency relationship, behavior that the Court's *Eastman Kodak* decision characterized as both unlawful tying and monopolization.

The Ninth Circuit's *Kodak* decision also grappled with a similar problem, but its decisional approach seems generally unsatisfactory. Initially, the court said that it would presume that Kodak's refusal to supply parts was protected by patent law.⁷⁹ Then, it upheld a jury verdict against Kodak, reasoning that the jury considered Kodak's asserted patent justification to be a pretext for violating the antitrust laws.⁸⁰ Allowing the inferred subjective intent of a patentee to destroy the protection

77. *PSI Repair Servs.*, 104 F.3d at 818; *Metzler v. Bear Auto. Serv. Equip. Co.*, 19 F. Supp. 2d 1345 (S.D. Fla. 1998).

78. *PSI Repair Serv., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997).

79. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d at 1214-15.

80. *Id.* at 1219-20.

that it would otherwise receive from the patent law would undermine confidence in patent law and generate legal uncertainty. Could the Ninth Circuit have avoided this problem by treating Kodak's patents as property like any other property? Had it done so, the court would have inquired into whether the jury properly found that the equipment market did not constrain the servicing market. If the equipment market did not constrain the servicing market, then could the court have rendered a decision against Kodak without undermining its patent rights?

Recall that when the aftermarket issue was before the Supreme Court in *Eastman Kodak*, it was cast in both tying and monopolization counts.⁸¹ Yet on remand, the case proceeded only on the ground of monopolization.⁸² Similarly, *Xerox* was litigated as a monopolization case. The reason why the plaintiffs concentrated on the monopolization count may have been the vulnerability of the tying claim. Over Kodak's objection that it was acting purely unilaterally, the Supreme Court inferred a tie from Kodak's willingness to provide parts only to aftermarket servicing customers. In doing so, the Court was not only pressing the limits of what may constitute a tie, but it was also employing an analysis different from that used by the lower court.⁸³ If the manufacturer's aftermarket behavior was unilateral behavior, then the monopolization clause was where they were most vulnerable.

Thus, it may have been the vulnerability of the defendants

81. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-79 (discussing tying); *id.* at 480-86 (discussing monopolization).

82. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d at 1201.

83. The *Eastman Kodak* decision is remarkably unclear as to the behavior that constituted the tie whose lawfulness was the subject of the Court's opinion. The Court stated in the text of its opinion "that Kodak would sell parts to third parties only if they agreed not to buy service from ISO's," *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 463 (1992), and then in an accompanying footnote restated Kodak's behavior as selling "to third parties on condition that they buy service from Kodak," *id.* at 463 n.8. The Ninth Circuit approached the issue in a slightly different way. That court read the provision in Kodak's agreement with equipment owners, "that it [would] sell parts only to users 'who service their own Kodak equipment,'" as constituting the tie. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990), *aff'd* 504 U.S. 451 (1992). Another circuit court read the same contractual language as not constituting a tying agreement. *Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 686 n.12 (4th Cir. 1992); see Daniel J. Gifford, *The Damaging Impact of the Eastman Kodak Precedent upon Product Competition: Antitrust Law in Need of Correction*, 72 WASH. U. L.Q. 1507, 1525 (1994).

to a charge of monopolization (through unilateral behavior) and their concomitant lack of vulnerability to a charge of tying that brought the antitrust laws into conflict with the intellectual property laws. If their behavior could have been characterized in tying terms, then conflict between antitrust and intellectual property laws might have been minimized or avoided. From behavior that Kodak characterized as unilateral, the Supreme Court inferred a conditional sale: Kodak sold "to third parties on condition that they buy service from Kodak."⁸⁴ That inferred condition comes close to the language in § 271(d)(5), which indicates that such behavior may be treated as misuse when performed by a patent owner possessing market power.⁸⁵ When the antitrust offense is consistent with behavior that patent law itself treats as misuse, there is no conflict.

Because the cases were litigated on monopolization counts, however, the defendants' behavior was evaluated as a purely unilateral refusal to deal. Nothing in the statutory patent misuse provisions would question the legitimacy of that unilateral behavior.⁸⁶ Thus, the courts had before them behavior that would be condemned if performed with unpatented parts or uncopyrighted manuals. Should the patented and copyrighted character of these products change that result? The owners' exclusive control over protected material goes to the core of intellectual property protection. The Federal Circuit felt compelled to uphold the right of the patent and copyright owner to refuse to deal.

It is ironic that the circuit courts were forced to choose between antitrust law and intellectual property law in these aftermarket cases. Congress has, over the years, minimized the differences between the way competition policies impact intellectual property and the way they affect all other forms of property. Congress wanted the Clayton Act's anti-tying provision to be applied in the same way to both patented and unpatented commodities. Congress's 1952 restrictions on the patent-misuse doctrine was a conservative one: The restrictions restored the doctrine of contributory infringement, anticipated later scholarship, and helped to bring the misuse doctrine into coherence with subsequently developed antitrust law.

84. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. at 463 n.8.

85. 35 U.S.C. § 271(d)(5) (2000).

86. Indeed, the Federal Circuit drew support for the legitimacy of the defendant's unilateral refusal to deal from the provisions of § 271(d)(4) that expressly authorize a patentee to refuse to license its patent.

Congress's 1988 amendments to the misuse provisions brought them even closer to contemporary antitrust case law.

Although the conflict between antitrust law and intellectual property laws in these cases probably could not have been avoided, these cases are not likely to be the forerunners of major new clashes between antitrust and intellectual property. Typically, intellectual property will not be treated differently in antitrust contexts from other property. In *Xerox* and *Kodak*, however, the issues were presented in a way that challenged the courts to recognize the core right of an intellectual property owner to refuse to deal. Ultimately, the Federal and Ninth Circuits gave us inconsistent responses. Under the Federal Circuit's ruling, behavior that would ordinarily constitute monopolization becomes protected when the property involved is protected by patent or copyright. The Ninth Circuit came closer to treating intellectual property in the same way as other property, but at the expense of a long recognized, core intellectual property right. Yet, the significance of this divergence should not be overstated. The lower courts, after extensive analyses, have determined that the aftermarket context from which this issue arose raises antitrust issues only in the rare cases where the primary equipment market is operating deficiently.

Of course, had Justice Scalia's approach to the *Eastman Kodak* issue prevailed, even the conflicts between antitrust and intellectual property laws exhibited in the decisions of the Federal and Ninth Circuits would not have arisen. Scalia believed that the "power" an equipment manufacturer possesses over equipment customers does not rise to the level of antitrust concern. Scalia's approach would make it easier to treat all intellectual property as just another variety of property. Perhaps the difficulties faced by the circuit courts in attempting to adjust the conflicting claims of antitrust and intellectual property laws provide support for Scalia's position.

The *Microsoft* case is particularly interesting from the perspective of the antitrust/intellectual property interface, because it too can be divorced from intellectual property rights. Despite Microsoft's argument that its behavior was privileged under copyright, and despite the District of Columbia Court of Appeals rulings on a number of copyright issues, the relevant monopoly for antitrust purposes may not have been the Windows operating system at all. Rather, the relevant monopoly might be better stated as that operating system's

interfaces: the application program interfaces (APIs).⁸⁷ It is these interfaces that software developers must access, and that produce the network effects that make them the industry interface standard.

The APIs, however, are probably not protected by copyright because they are unprotected "systems of operation" under § 102(b) of the copyright act.⁸⁸ Even apart from § 102(b), several copyright fair use cases indicate that APIs are unprotectable as against software providers that need access to the Windows operating system.⁸⁹ Thus, the issue in the Microsoft antitrust case might involve the behavior in which that company engaged to protect its monopoly over the Windows APIs. Since the Windows APIs were probably not protected by copyright, the case, so viewed, did not involve the antitrust/intellectual property interface at all.

The court, of course, did rule that Microsoft acted unlawfully when it forbade computer manufacturers from removing the Microsoft browser from its Windows operating system.⁹⁰ This part of the court's ruling could be viewed as an antitrust court significantly intruding into the domain of copyright. After all, the ruling effectively took control over a derivative work from the copyright holder. Yet, the court's ruling could also be viewed from the premise that copyright law, in creating rights to remedy a market failure, creates property rights that are on par (no more, no less) with other property rights. From that perspective, the court might merely be dealing with the intellectual property rights of Microsoft as it would deal with the property rights of any manufacturer in an integrated product not protected by copyright or other intellectual property rights.

This is not the first time that the courts have dealt with so-called technological integration. When the issue is whether a

87. See Daniel J. Gifford, *Developing Models for a Coherent Treatment of Standard-Setting Issues Under the Patent, Copyright and Antitrust Laws*, IDEA (forthcoming 2003).

88. *Id.* (explaining why APIs are "systems of operation"); see also *Lotus Dev. Corp. v. Borland Int'l Inc.*, 49 F.3d 807, 813-18 (1st Cir. 1995) (discussing systems of operation), *aff'd by an equally divided court*, 516 U.S. 233 (1996).

89. See *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 603-04 (9th Cir. 2000); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524-26 (9th Cir. 1992); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992).

90. *United States v. Microsoft Corp.*, 253 F.3d 34, 61 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001).

firm restrains competition in the market for a product which is effectively tied to another principal product, the plaintiff carries a substantial burden. That was the ruling on the tying issue in *Microsoft* where a copyrighted product was the subject of the litigation.⁹¹ That was also the ruling in the technological integration tying cases of two decades ago (whether they were cast in tying or monopolization language) involving IBM's mainframe computers where no intellectual property was involved.⁹² These two pieces of litigation show a remarkable similarity in the treatment of the restraint imposed in the ancillary market.

Microsoft, of course, also involved a second and quite different legal issue: whether the steps that Microsoft took to prevent computer manufacturers from removing the browser (and thereby reversing that integration) were a means of preserving its Windows monopoly.⁹³ That second issue involved an unusual form of monopolization: monopoly maintenance. On this second issue, the court placed the burden of justification on Microsoft—a burden that Microsoft failed to carry.⁹⁴ IBM never faced the issue of monopoly maintenance. Yet, Microsoft would have been required to justify its integration—or more precisely, the steps that it took to ensure that computer manufacturers would not undo that integration—whether its products (the operating system and the browser) were or were not protected by copyright.⁹⁵ In short, issues connected with technological integration can be resolved without regard to whether the integrated product or any of its components is protected by copyright. Copyright protections are not undermined when the court affords the same respect to copyright property as it does to property in general.

91. *Id.* at 95 (“[I]t is the plaintiff’s burden to show that the anticompetitive effect of the conduct outweighs its benefit.”).

92. See *Memorex Corp. v. IBM Corp.*, 636 F.2d 1188, 1188 (9th Cir. 1980); *Cal. Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 733 (9th Cir. 1979); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 448 F. Supp. 228, 229 (N.D. Cal. 1978); *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, 342 (N.D. Okla. 1973), *rev’d on other grounds*, 510 F.2d 894 (10th Cir. 1975).

93. *Microsoft Corp.*, 253 F.3d at 65.

94. *Id.* at 67.

95. See Daniel J. Gifford, *What Is Monopolization Anyway? The D.C. Circuit Grapples with Some Perplexing Issues*, 46 ANTITRUST BULL. 797, 825-30 (2001) (discussing technological integration).

CONCLUSION

Sometimes it may be necessary to accord special treatment to intellectual property in antitrust contexts. The Federal Circuit did so in *Xerox*. Nonetheless, Congress has tried to minimize potential conflict between the policies embodied in intellectual property laws and those embodied in antitrust laws. It sought equal treatment of unpatented and patented commodities under the Clayton Act in 1914. Its restrictions upon the elements of competition policy that could be incorporated into the patent misuse doctrine have helped to bring the competition policies of antitrust laws and the competition policies of patent laws into closer alignment.

The major arena in which antitrust and intellectual property policies are currently in substantial conflict involves the copyright misuse doctrine. That doctrine is a relatively new judicial creation that the courts assert is modeled upon the patent misuse doctrine. Yet, the courts have ignored the congressional interventions that both limited the patent misuse doctrine, and restructured it to bring it into alignment with antitrust law. The courts have not yet fully considered the ramifications of the broad misuse doctrine that they have created. There may be a place for an independent copyright misuse doctrine, but the dimensions of that misuse cannot be taken over bodily from a judicially developed patent law that Congress has rejected.